



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 17, 1995

Mr. Mark S. Houser
Vial, Hamilton, Koch & Knox, L.L.P.
1717 Main, Suite 400
Dallas, Texas 75201

OR95-128

Dear Mr. Houser:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. The City of Highland Village (the "city") received an open records request from a former employee. The city has released some of the requested records but contends that other records are excepted from disclosure pursuant to section 552.103(a) of the Government Code. The city's request was assigned ID# 30040.

You have indicated that one of the requested records does not exist. The city must make a good faith effort to relate a request to information held by the city. Open Records Decision No. 87 (1975). However, the city is not required to provide information that is not in its possession or to compile new information to comply with an open records request. Open Records Decision Nos. 561 (1990) at 9 (city does not have to obtain new information); 362 (1983) at 2 (city does not have to supply information that does not exist.) You also state that the requestor has already obtained copies of some of the requested documents. Even if the requestor has previously obtained copies of records, the city may not ignore a request for more copies of the same records. Open Records Decision No. 512 (1988) (governmental body may not deny repeated requests for information).

As to the other requested records, you contend that the following information may be withheld from disclosure pursuant to section 552.103(a):

1. notes taken by Paula Lawrence of a meeting between the former employee and city manager Bo McDaniel;

2. comments written in the dispatch memo book on July 29, 1994, regarding instructions from Chief of Police V. Maples to the former employee; and
3. a memo to police personnel concerning release of the city's compliance audit.

You submitted the records at issue to this office for review.

To show that section 552.103 is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Open Records Decision No. 551* (1990) at 4. The governmental entity must meet both prongs of this test for information to be excepted under section 552.103. *See Open Records Decision Nos. 518* (1989) at 5 (governmental body must show that litigation involving specific matter is realistically contemplated); *328* (1982) at 1 ("mere chance" of litigation does not trigger litigation exception).

You submitted documents to this office showing that the city has been sued by its former police chief and several current and former police officers for libel, slander, and intentional infliction of mental anguish. Among the allegations are that other city officials conspired to intimidate the plaintiffs, spread rumors about them, and leak information concerning them to the press. We note that we were not able to read one of the documents and thus were unable to determine if it was related to the litigation. As to the other documents at issue, our review shows that they are related to the litigation. Since the city has met its burden of showing that these records relate to pending litigation, they may be withheld from disclosure pursuant to section 552.103(a).

In reaching this conclusion, however, we assume that the opposing parties to the litigation have not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *Open Records Decision Nos. 349* (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We note that the applicability of section 552.103(a) ends once the litigation has been concluded. *Attorney General Opinion MW-575* (1982); *Open Records Decision No. 350* (1982) at 3. Also, since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the city's discretion to release this information to the requestor. *Gov't Code § 552.007*; *Open Records Decision No. 542* (1990) at 4.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/MAR/rho

Ref.: ID# 30040

Enclosures: Submitted documents

cc: Ms. Shirrilane S. Ruth
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(w/o enclosures)